DATO' SRI TEONG TECK LENG

v.

JUPITER SECURITIES SDN BHD

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD FCJ
MOHD GHAZALI YUSOFF JCA
FAIZA THAMBY CHIK J
[CIVIL APPEAL NO: W-03-57-00]
5 SEPTEMBER 2003

BANKRUPTCY: *Petition - Opposition to petition - Whether judgment debtor must file summons-in-chambers supported by affidavit - Whether sufficient to file notice in Form 16 under r. 117 Bankruptcy Rules 1969 - Distinction between challenging bankruptcy notice and bankruptcy petition - Whether r. 18(1) Bankruptcy Rules 1969 applies in respect of challenges to bankruptcy petitions - Distinction between 'to show cause against a petition' and 'to challenge a petition' - Whether notice of intention to oppose creditor's petition should be heard separately*

This was an appeal by the debtor against the decision of the judge-in-chambers rejecting his appeal against the order of the senior assistant registrar dismissing his notice of intention to oppose the creditor's petition. In dismissing the debtor's appeal, the judge-in-chambers had upheld the creditor's preliminary objection that the mere filing of the notice of intention to oppose the creditor's petition fell short of the requirements of r. 18(1) of the Bankruptcy Rules 1969 ('the Rules'). Hence, the narrow issue that arose for decision in the instant appeal was whether, in opposing a creditor's petition, it is sufficient that the debtor files a notice of intention to oppose the petition, or must the debtor also file a summons-in-chambers supported by an affidavit.

Held (allowing the appeal):
Per Abdul Hamid Mohamad FCJ

[1a] Where a judgment debtor wishes only to show cause against a creditor's petition, all he has to do is to file a notice in Form 16 (under r. 117) of the Rules specifying the statements in the petition which he intends to deny or dispute. The requirement of filing a summons-in-chambers supported by an affidavit under r. 18(1) of the Rules appears to apply only in respect of a challenge to a bankruptcy notice and not a

bankruptcy petition. Consequently, the debtor in the instant appeal, having filed a notice of intention to oppose the creditor's petition, would not have to file a summons-in-chambers. (pp 41 a, d-g & 42 a, e-f)

[1b] Furthermore, a distinction may also be drawn between the phrases 'to show cause against a petition' and 'to challenge a petition'. In the case of the former (which was also the situation in the instant appeal) the procedure is governed by r. 117 (Form 16) of the Rules. However, in the case of the latter – where for example the judgment debtor wants to apply to set aside the creditor's petition – a summons-in-chambers has to be filed. (p 42 b-d)

Per curiam:

[1] There should not have been a separate hearing for the debtor's notice of intention to oppose the creditor's petition; it should have been considered at the hearing of the creditor's petition. A statement of defence is not heard separately from the hearing of the claim. (pp 42 h & 43 a)

[Debtor's appeal allowed; matter remitted to High Court for hearing of debtor's appeal on the merits.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini merupakan rayuan dari penghutang terhadap keputusan hakim dalam kamar yang menolak rayuan beliau terhadap perintah penolong kanan pendaftar yang menolak notis pemberitahuan niatnya untuk menentang petisyen pemiutang. Ketika menolak rayuan penghutang, hakim dalam kamar telah mengesahkan bantahan awal pemiutang bahawa pemfailan semata-mata notis pemberitahuan niat tidak memenuhi keperluan k. 18(1) Kaedah-kaedah Kebankrapan 1969 ('Kaedah'). Oleh yang demikian, isu yang berbangkit untuk keputusan dalam rayuan semasa ini adalah samada, di dalam menentang petisyen pemiutang, ianya memadai jika penghutang memfailkan satu notis pemberitahuan niat untuk menentang petisyen, atau adakah penghutang mesti memfailkan juga satu saman dalam kamar yang disokong oleh afidavit.

Diputuskan (membenarkan rayuan):
Oleh Abdul Hamid Mohamad HMP

[1a] Jika penghutang penghakiman hanya berhajat untuk tunjuk sebab terhadap petisyen pemiutang, apa yang perlu dibuatnya hanyalah memfailkan satu notis dalam Borang 16 (dibawah k. 117) Kaedah sekaligus menetapkan pernyataan-pernyataan di dalam petisyen yang ingin dinafikan atau

dipertikaikan. Keperluan untuk memfailkan saman dalam kamar yang disokong oleh afidavit dibawah k. 18(1) Kaedah nampaknya hanya terpakai apabila sesuatu notis kebankrapan hendak dipertikaikan dan bukan terhadap petisyen kebankrapan. Oleh sebab itu, penghutang dalam rayuan semasa, dengan memfailkan notis pemberitahuan niat untuk menentang petisyen pemiutang, tidak perlu lagi memfailkan satu saman dalam kamar.

[1b] Selanjutnya, terdapat satu perbezaan diantara ungkapan 'untuk tunjuk sebab terhadap satu petisyen' dan 'untuk menentang petisyen'. Dalam kes yang terdahulu (yang merupakan situasi dalam rayuan ini) prosedurnya ditetapkan dibawah k. 117 (Borang 16) Kaedah. Manakala, dalam kes yang kemudian – dimana penghutang penghakiman umpamanya ingin memohon untuk mengenepikan petisyen pemiutang – satu saman dalam kamar hendaklah difailkan.

Per curiam:

[1] Adalah tidak perlu notis pemberitahuan niat penghutang untuk menentang petisyen pemiutang didengar secara berasingan; ianya adalah wajar dipertimbangkan semasa pembicaraan petisyen pemiutang. Satu pernyataan pembelaan tidak didengar berasingan dari tuntutan.

Rayuan penghutang dibenarkan; perkara diremitkan ke Mahkamah Tinggi untuk pendengaran rayuan penghutang atas merit.]

Case(s) referred to:

Datuk Lim Kheng Kim v. Malayan Banking Bhd [1993] 3 CLJ 324 SC ***(dist)***

Re Ngan Chin Wen ex p Moscow Norodny Bank Ltd [1996] 2 CLJ 943 HC ***(foll)***

Legislation referred to:

Bankruptcy Act 1967, s. 3(1)(i)

Bankruptcy Rules 1969, rr. 18(1), 117

Rules of the High Court 1980, O. 14 , O. 18 r. 19

For the appellant/debtor - K Balaguru (Paul Ong & Olivia Ho); M/s Paul Ong & Assoc

For the respondent/creditor - CS Kumar (Desmond Ng & YT Lim); M/s Shui Tai

Reported by Gan Peng Chiang

JUDGMENT

Abdul Hamid Mohamad FCJ:

On 14 April 1998 Jupiter Securities Sdn. Bhd., the judgment creditor in the High Court and the respondent here ("the judgment creditor") obtained summary judgment under O. 14 of the Rules of the High Court 1980 ("RHC 1980") against Dato' Sri Teong Teck Leng, the judgment debtor in the High Court and the appellant here ("the judgment debtor") and another person by the name of Loh Kon Wah. The judgment debt was for RM2,460,377.66 and interest of RM161,003.15, further interest and costs.

On 2 July 1998, a request for a bankruptcy notice to be issued against the judgment debtor was filed.

On 14 September 1998, the bankruptcy notice was personally served on the judgment debtor.

On 30 September 1998, the judgment debtor filed a summons in chambers (encl. 5) for an order that the whole of the bankruptcy proceedings not limited to the creditor's petition and the bankruptcy notice dated 2 July 1998 be struck out and set aside.

Alternatively, it was prayed that the whole of the bankruptcy proceedings be stayed until the disposal of the notice of appeal to the judge in chambers dated 17 April 1988 against the summary judgment dated 14 April 1988 is disposed off.

There was no mention under which rule the application was made, but it must have been under r. 18, Bankruptcy Rules 1969 ("the Rules").

On 22 December 1998 a creditor's petition dated 15 December 1988 (encl. 10) was filed.

On 23 February 1999, encl. 5 was heard and dismissed with costs.

On 24 February 1999, a notice of appeal to the judge in chambers was filed against the order dismissing encl. 5.

On 1 April 1999, the creditor's petition was served on the judgment debtor.

On 8 April 1999, the judgment debtor filed a notice of intention to oppose the creditor's petition (encl. 13). The ground stated in the notice was:

> … I intend to dispute any outstanding sum owing to the judgment creditor amounting to the said RM2,842,321.61.

So, the only ground of objection was that the judgment debtor disputed the amount of the debt as stated in the creditor's petition.

On 19 April 1999, the judgment debtor filed an affidavit in support of the notice of intention to oppose the creditor's petition.

On 24 September 1999, the senior assistant registrar heard and dismissed encl. 13, ie, the notice of intention to oppose the creditor's petition.

On 27 September 1999, the judgment debtor filed a notice of appeal to the judge in chambers against the order of 24 September 1999.

On 15 October 1999 the senior assistant registrar heard the creditor's petition (encl. 10). Adjudicating and receiving orders were made.

On 18 October 1999, the judgment debtor filed a notice of appeal to the judge in chambers (encl. 35) against the order of the senior assistant registrar made on 15 October 1999.

On 12 May 2000 Steve LK Shim J (as he then was) dismissed the appeal on a preliminary objection raised by the learned counsel for the judgment creditor.

The judgment debtor appealed to this court.

It should be noted that the learned judge decided on a preliminary objection that the notice of intention to oppose the creditor's petition had not complied with r. 18(1) of the Bankruptcy Rules 1969 ("the Rules"). The learned judge cited a passage from the judgment of Mohd. Dzaiddin SCJ (as he then was) in *Datuk Lim Kheng Kim v. Malayan Banking Bhd.* [1993] 3 CLJ 324:

> Looking at the appellant's 'affidavit in opposition', it appears that he had jumbled up every conceivable ground of opposition he could think of in this affidavit, which not only includes grounds raised in enclosure 3, but also the submissions of law and pleas for the court to exercise its discretion judicially and in the interest of justice. Bearing in mind that this 'affidavit in opposition' was filed one month after the creditor's petition was served on him and contained multitude of grounds other than the existence of a counter-claim or set-off or cross-demand, he should have made a formal application by motion supported by this affidavit in compliance with r. 18 ... In our opinion, **failure on the part of the appellant to follow r. 18 renders his 'affidavit in opposition' ineffective and bad in law because** unless the court otherwise directs, challenges to the creditor's petition or bankruptcy notice other than that he has a counter-claim, set off or cross-demand which equals or exceeds the judgment debt, **must be made by filing a notice of motion supported by an affidavit.**

The learned judge then went on to say:

> It seems clear from the parts underscored above that, in His Lordship's view, any challenge to the creditor's petition under r. 117, (on grounds other than the existence of a counter-claim, set-off or cross-demand), has to be made by filing a notice of motion (now a summons-in-chambers), supported by an affidavit pursuant to r. 18. Given the legal position enunciated by the highest judicial authority, I have to conclude that the filing of the Notice of Intention to Oppose the Creditor's Petition in the instant case, in which the JD is merely disputing the amount claimed by the JC, constitutes a challenge to the Creditor's Petition and therefore it is incumbent on the JD to file a summons-in-chambers supported by an affidavit in compliance with r. 18 Bankruptcy Rules. The JD has obviously failed to do so. It is insufficient for the JD to merely file in the said Notice of Intention to Oppose.

From the grounds of judgment that was the only ground on which the learned judge decided the case, without considering the merits of the petition.

Before us, besides attacking the judgment on that ground, Mr. K. Balaguru, learned counsel for the judgment debtor also submitted that the receiving order and the adjudicating order should not have been made simultaneously. The learned judge did not deal with this issue.

The minutes of the proceedings do not reflect what transpired before the learned senior assistant registrar, who heard the petition and made the receiving order and adjudicating order. The notice of appeal to the judge in chambers, by its nature or form, does not contain any indication whether that was one of the grounds of appeal to the judge in chambers. So we do not know what was actually argued before him. Again, in an appeal to a judge in chambers, a memorandum of appeal is not required to be filed. So again, we are unable to know from the memorandum of appeal whether that was one of the grounds of the appeal to the judge in chambers.

The notes of proceedings recorded by the learned judge showed that, at the outset of the submissions before him, the learned counsel for the judgment debtor said that he wished to raise four points, one of which was that the learned senior assistant registrar ought not to have granted an adjudicating order at the hearing of the creditor's petition. To that ground, learned counsel for the judgment creditor replied that it should not be canvassed as it was only made known to him the previous day. To that objection, learned counsel for the judgment debtor replied that he could not have raised it before the senior assistant registrar as he would not know the mind of the senior assistant registrar. Learned counsel for the judgment creditor then informed the court that he was not ready to submit on that ground due to the short notice. The appeal to the judge in chambers was then adjourned to 5 April 2000.

On 5 April 2000, learned counsel for the judgment debtor began his submission by raising the preliminary submission mentioned earlier. It is to be noted that both counsel only argued on the preliminary objection. No mention was made of the ground that both the Receiving Order and the Adjudicating Order should not have been made simultaneously. At the end of their submissions the learned judge recorded that he thought that the preliminary objection was "a significant one". So, he reserved his decision to 12 May 2000 on which date he delivered his judgment dismissing the appeal with costs. He also recorded "Preliminary Objection sustained."

It is clear therefore, why, in his judgment, the learned judge did not deal with that ground, but only with the preliminary objection.

Coming back to the main ground raised in the preliminary objection, the issue is simply whether, to oppose a creditor's petition, it is sufficient that a notice of intention to oppose the creditor's petition be filed or must the judgment debtor also file a summons in chambers pursuant to r. 18 of the Rules.

Before going any further, it is worthwhile to mention that there are two stages in a bankruptcy proceeding, namely, the notice stage and the petition stage. In this appeal, we are only concerned with the petition stage. How does a judgment debtor show cause against the creditor's petition? Is it sufficient for him to file a notice of intention to oppose the creditor's petition (Form no. 17, r. 117)? Must he also file a summons in chambers under r. 18?

Rule 117 provides:

> 117. Where a debtor intends to show cause against a petition he shall file a notice with the Registrar specifying the statements in the petition which he intends to deny or dispute and transmit by post or otherwise to the petitioning creditor and his solicitor if known a copy of the notice three days before the day on which the petition is to be heard. (emphasis added).

The form provided is Form No.16. The substantive part of the form merely provides:

> I, the above ..., do hereby give you notice that I intend to oppose the making of a receiving order as prayed and that I intend to dispute the petitioning creditor's debt (or the act of bankruptcy, as the case may be).

In our view, where the judgment debtor only wishes to show cause against the petition, all he has to do is to file a notice in Form No. 16 specifying the statements in the petition which he intends to deny or dispute. That is all he has to do. This has been correctly pointed out by James Foong J in *Re Ngan Chin Wen Ex-Parte: Moscow Norodny Bank Ltd.* [1996] 2 CLJ 943. In that case, the judgment debtor filed a notice to oppose the petition pursuant to r. 117 of the Bankruptcy Rules 1969 followed by an affidavit alleging that he had satisfied the judgment debt by paying a sum of US$200,000 to the petitioning creditor as full and final settlement of the judgment debt. The judgment debtor had not made an application or file an affidavit to set aside the bankruptcy notice within seven days of the service of the bankruptcy notice pursuant to s. 3(1)(i) of the Bankruptcy Act 1967. The learned judge held that by filing a notice to oppose the petition pursuant to r. 117, the judgment debtor had a right to be heard even though he had not complied earlier with s. 3(1)(i) of the Act. However, the judgment debtor's opposition at the hearing must be confined strictly to matters provided under ss. 5(1) and 6(2) of the Act.

The problem faced by the learned judge in the instant case actually arose from three words ie, "bankruptcy petition or" in the judgment of Mohd. Dzaiddin SCJ in *Datuk Lim Kheng Kim v. Malayan Banking Bhd. (supra)* that was quoted by him. The sentence "… challenges to the creditor's petition or bankruptcy notice other than that he has a counterclaim … must be made by filing a notice of motion supported by an affidavit" has been understood by the learned Judge to mean that even to show cause against a petition, a summons in chambers under r. 18 must be filed.

Perhaps, it is unfortunate that both creditor's petition and bankruptcy notice were mentioned in the same sentence. But if we bear in mind the two stages, the confusion could be avoided. It is also quite unfortunate that the mention of "counterclaim" etc. immediately after the words "challenges to the creditor's petition or bankruptcy notice …" gives the impression that, a challenge on the ground that a debtor has a counterclaim etc. may be made at the creditor's petition stage. That is not so and cannot be so because such a challenge may only be made at the bankruptcy notice stage, in fact within seven days after the service of the bankruptcy notice. And, until that issue is determined, no act of bankruptcy is deemed to have been committed (r. 95(2)) which would mean that the creditor's petition cannot even be filed yet. This is confirmed in *Datuk Lim Kheng Kim*'s case *(supra).*

So, the reference to counterclaim etc. in that passage only refers to a challenge to the bankruptcy notice. Such challenge may be made by filing an affidavit in Form No. 7 under r. 95. But, a challenge to the bankruptcy notice on other grounds may only be made by filing a summons in chambers under r. 18.

As we have said earlier, the inclusion of the words "creditor's petition or" in that sentence is rather unfortunate. But, we think that even that can be explained if we draw a distinction between "to show cause against a petition" and "to challenge a petition". In the case of the former, the method is provided by rule 117 (Form No. 16). But, where the debtor wants to apply to set aside the petition on other grounds, eg, for non-compliance with the rules regarding the petition, then a summons in chambers must be filed. This is understandable because such grounds arise separately from the statements in the petition and therefore cannot be "specified" in the notice (Form No. 16). The difference between the two may be likened to a defendant in a civil suit who wants to defend the action and a defendant who wants to strike out the writ and the statement of claim. In the case of the former, he merely files a statement of defence. In the latter case, he has to file a summons in chambers under O. 18 r. 19 RHC 1980.

In the instant case, a notice of intention to oppose the creditor's petition pursuant to r. 117 was filed. That would be sufficient to entitle the debtor to oppose the petition. He does not have to file further a summons in chambers for the purpose. We are of the view therefore that the judgment of the learned judge cannot be supported and the appeal should be allowed and the case be remitted back to the High Court for further hearing of the appeal to the judge in chambers on merits, which had not been done. We also think that it is premature for us to decide on the second issue, ie, whether an adjudicating and a receiving order can be made at the same time. The parties had not argued the issue before the learned judge and the learned judge had not decided on it. We would like to clarify that this further hearing of the appeal need not be heard by the same judge (as he then was) who had heard this appeal.

We also note that in the instant case, the learned senior assistant registrar first heard encl. 13 (notice of intention to oppose the creditor's petition) and after deciding on encl. 13, heard the creditor's petition three weeks later.

We are of the view that there should be no separate hearing of the notice of intention to oppose the creditor's petition. It is to be considered at the hearing of a creditor's petition, just as a statement of defence is not heard separately from the hearing of the claim. It may be different in the case of an application

by way of a summons in chambers to strike out the creditor's petition. Even then, for the sake of expediency, unless, for some reasons, it is not practical, the summons in chambers should be heard together with the creditor's petition.

We also note that the learned judge heard the appeal purely on the preliminary objection. This practice, as far as possible, should be avoided. It delays the disposal of the petition. This case is a good example. Five years after the commencement of the bankruptcy proceedings, this court is only hearing and deciding an appeal on the preliminary objection.

We hereby allow the appeal with costs here and in the court below and order that the deposit be refunded to the appellant.